IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 55 OF 1991

Rangnath Ganpat Mali (Thorat)
(since deceased by his heirs)
1a. Dattatraya Rangnath Mali (Thorat)
1b. Rajendra R. Thorat
1c. Surekha R. Thorat
1d. Kavita Madhukar Gaikwad
1e. Muktabai Raghunath Thorat
Res.No.1b,1c,and 1e Res.at
House No.3441, Chavata,
Nashik Road, Nashik
No.1d Res. At Kopargaon,
Tal.Kopergaon, Dist.Ahmednagar
(Amendment carried out as per
Courts Order dated 26/06/2002
in C.A. 435/02) **... Appellant (Original Plaintiff)**

Versus

Hari Namdeo Mali **... Respondent (Original Defendant)**

Mrs. Anita A. Agarwal, Advocate for Appellant
Mr. C.G. Gavnekar with Mr. S.M. Mhamane Advocate for Respondent

CORAM : ***S.R.SATHE,J.***
DATED : ***5th JULY, 2006***

ORAL JUDGEMENT :-

1. The appellant, the original Plaintiff in Regular Civil Suit No.41 of 1981 has preferred this appeal against the judgement and order passed by the Court of Additional District Judge, Nashik in Civil Appeal No.21 of 1986 whereby the order passed by the Court of Second Junior Civil Judge, Junior Division Nasik dismissing the Plaintiff's suit for permanent injunction was confirmed and

appeal was dismissed. For the sake of convenience hereafter the parties shall be referred to as *'Plaintiff'* and *'Defendant'*.

2. The brief facts giving rise to this appeal are as under :-

The suit lands bearing survey No.50/4B and 50/5 situated at village Deolali and some other properties were initially owned by the joint family of Rama and his four sons namely Mahadu, Shivaram, Kanu and Namdeo. The present Plaintiff Rangnath Ganpat Mali (Thorat) is the grand son of Mahadu, while, the defendant Hari Namdeo Mali is the son of Namdeo Rama Mali. Thus, the defendant is Plaintiff's uncle. According to Plaintiff, the suit property described in detail in para-1 of the plaint was in possession of one Murlidhar Laxman Khole, however, on 29/03/1955, Murlidhar Khole handed over the possession of the suit lands to Plaintiff and defendant and since then the said lands were in their possession. It is Plaintiff's case that one Chandrabhaga, wife of Pundalik Thorat on 05/12/1936 executed register Gift Deed of her 1/2 share in the suit property to the appellant/plaintiff. Accordingly, mutation entry was carried out. As Plaintiff was serving in Revenue Department at Nasik, he was getting the suit lands cultivated through his servants. It is Plaintiffs case that taking advantage of his absence, respondent tried to get

his name entered in the record of rights, for which the Plaintiff took action against the defendant. According to him, he was in fact cultivating the land of his share separately. However, in August or September, 1980, the defendant tried to get his name entered in the column of kabjedar and vahivatdar of 7 x 12 extracts of the suit lands. Not only that but he also started obstructing Plaintiff's possession of the suit land. Hence, on 20/01/1981 Plaintiff filed suit for permanent injunction against the defendant and prayed that the defendant and his agents and servants be permanently restrained from obstructing Plaintiff's possession of the suit lands.

3. The defendant filed his Written Statement at Exh-21 and opposed the suit claim. He denied the Plaintiff's allegation that the suit lands were in possession of Murlidhar Khole and he surrendered the possession to Plaintiff and defendant on 29/03/1955 and they are in possession of their respective shares. He also denied the execution of alleged gift deed in favour of Plaintiff. The defendant contended that Plaintiff is residing alongwith his family members for last about 30 years at Nashik and his case that the land of his share is being cultivated through labourers and Plaintiff's wife is supervising the said cultivation is false. He on the contrary contended that plaintiff even did not cultivate the land which was of

his exclusive share. The defendant also contended that the suit lands are in his exclusive possession since his for-fathers and no actual partition has taken place in respect of the said lands nor the same are divided by putting bunds and that he has become owner of the lands of plaintiff's share by adverse possession. He further contended that Plaintiff had in fact filed suit for partition and separate possession against him and his brothers. The said suit bearing No.49/1973 was compromised and accordingly, it was decided that defendant should hand over 1/2 share in the suit lands to Plaintiff. However, defendant never got the said decree executed for obtaining possession of the lands. The defendant therefore contended that Plaintiff is not entitled for permanent injunction as prayed and the suit be dismissed.

4. On these pleadings the learned trial Judge framed issues at Exh-22.

5. In order to prove the suit claim, the Plaintiff examined himself at Exh-30 and four other witnesses. As against this, the defendant examined himself at Exh-47 and one witness by name Trimbak Khandu Lavte at Exh-53. After considering the evidence of both the parties, the learned trial Judge came to the conclusion that Plaintiff has failed to prove his possession of the suit land on the date

of the suit. Naturally, he dismissed the Plaintiff's suit.

6. Being aggrieved by the above mentioned order, Plaintiff filed Regular Civil Appeal No.21 of 1986, however, the same also came to be dismissed.

7. The above mentioned order of the First Appellate Court is challenged in the present Second Appeal. While admitting the appeal this Court ***(CORAM : A.A. DESAI, J.)*** has passed following order :-

> *" Admit. The substantial question of law is as to whether in view of the ownership and entries regarding possession in the record of rights, the Plaintiff could be refused a relief of injunction."*

8. In this appeal before me Mrs. Anita Agarwal, learned advocate for the Plaintiff has urged only two points. Firstly, she submitted that there are various mutation entries and the 7 x 12 extracts on record which go to show that the suit lands are jointly owned by Plaintiff and defendant and as such both the Courts below ought to have given due weightage to the said entries and should have held that Plaintiff is entitled for the injunction. Secondly, she canvassed before me that even in the decree that was passed in Regular Civil Suit no.73 of 1949, it is

held that Plaintiff is having 1/2 share in the suit lands. So, under these circumstances, appeal be allowed and Plaintiff's suit be decreed in his favour.

9. As against this, Shri C.G. Gavnekar, learned advocate for the defendant submitted that admittedly Regular Civil Suit No. 73 of 1949 which was filed for partition and separate possession by the Plaintiff was compromised and in pursuance of the said compromise, Plaintiff was to get the possession from the defendant and on defendant's failure to give the same, plaintiff was to take the possession in execution proceedings. However, the execution proceedings filed by the Plaintiff has been dismissed on the ground of limitation, so Plaintiff is not in possession of the suit lands and as such both the Courts below have rightly held that Plaintiff is not entitled for injunction.

10. During the pendency of this Second Appeal, the defendant filed Civil Application No.666 of 2006 with a view to bring on record the order passed by the executing Court in Regular Darkhast No.22 of 1996. The learned advocate for the Plaintiff also fairly submitted that such an application for execution was filed and the same was dismissed. The said event being very relevant and having bearing on the issue involved in the question the defendant

was allowed to produce the said document and rely on the same and as such the said application is allowed.

11. The relationship between the parties is not in dispute. From the evidence of Plaintiff and defendant, it is quite clear that both of them admit that as per the decree passed in Regular Civil Suit No.73 of 1949, Plaintiff is having 1/2 share in the suit lands. Admittedly, at the time of filing of the said suit, the suit lands were in possession of the defendant. Though, the Plaintiff and his witnesses have made an attempt in the present suit to show that Plaintiff is having separate possession of the particular portion of the suit survey numbers, they have utterly failed to prove the same. On the contrary, Plaintiff's witnesses have clearly stated at some stage that suit lands are in possession of Plaintiff as well as defendant. Not only that but it has also come through their evidence that as it is there are no bunds separating the portion of Plaintiff's land and defendant's land. It was tried to be argued on behalf of the Plaintiff that there are 7 x 12 extracts which go to show that name of plaintiff is appearing in holder's column as well as in column of kabjedar. However, the evidence on record is clear to show that the Plaintiff was not in actual possession of any particular portion of the suit land. What is more to be noted is that plaintiff has not at all come

to the Court with a case that he is having joint possession of the suit lands alongwith the defendant and defendant is obstructing to his joint possession. Naturally, at this stage, the argument that the defendant can not obstruct the Plaintiff, he being co-owner of the suit land does not survive. It is needless to say that Plaintiff must stand or fall on his own pleadings. He has come to the Court with definite case that he is in exclusive possession of particular portion of the suit land. Both the Courts below have rightly held that the Plaintiff has utterly failed to prove his exclusive possession of a particular portion of the lands bearing Survey No.50/4B and 50/5.

12. From the evidence on record, it is very clear that the defendant is residing at Nasik alongwith his family members for last about 30 years, as he is serving there. Not only that but it has come on record that even the land which is exclusively owned by Plaintiff is not being actually cultivated by him and he is getting such land cultivated through his labourers. So far as the suit lands are concerned he has failed to prove to adduce any evidence even for such cultivation.

13. The defendant has produced on record the certified copies of the order passed in Regular Darkhast No. 22 of 1996. Admittedly, the said Darkhast was filed in pursuance

of the compromise decree passed in regard to the Civil Suit No.73 of 1949 on 17/07/1953. Plaintiff himself has admitted that prior to this Darkhast, he has never filed any other execution proceedings nor there is any material to show that in pursuance of the said compromise, the defendant had voluntarily surrendered particular portion of the suit land to plaintiff. It is crystal clear that the regular Darkhast No.22 of 1996 has been dismissed not being filed within 12 years from the decree. So, this Darkhast which was filed for possession of the suit land gives death blow to Plaintiff's case that on the date of the suit i.e. on 20/01/1981, he was in actual possession of the suit land. Naturally, under the circumstances of the case merely because in previous suit Plaintiff has been held to be the owner of 1/2 share in the suit lands. Plaintiff is not entitled for permanent injunction. Thus, it is very clear that both the Courts below have rightly considered the evidence on record and correctly held that Plaintiff is not entitled for the permanent injunction as prayed. Thus, in a way no substantial question of law is involved in the present matter.

14. In view of above, I have absolutely no hesitation to hold that there is no necessity to interfere with order passed by the Courts below.

15. Hence, the appeal be dismissed with costs.

(S.R.SATHE,J)